

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN DIFRANCESCO

Appellant

V.

**MAYOR AND TOWN COUNCIL OF
THE OF ELSMERE, DELAWARE
CONSISTING OF RICHARD A.
HEROLD, JOHN JAREMCHUK,
PATRICIA L. FRANTZ,
TOM NOVAK, JOHN PASQUALE,
CHARLES MCKEWEN, AND
JOANNE PERSONTI**

Appellee

Submitted: April 25, 2007

Decided: June 28, 2007

MEMORANDUM OPINION

*Upon Petition for a Writ of Certiorari from a
Decision of the Mayor and Council of the Town of Elsmere - **GRANTED***

Thomas C. Marconi, Esquire, and Paul E. Bilodeau, Esquire, of Losco & Marconi,
attorneys for appellant

Edward M. McNally, Esquire, and Rafael X. Zahralddin-Aravena, of Morris James LLP,
attorney for appellee

HERLIHY, Judge

Petitioner John DiFrancesco has petitioned for a writ of *certiorari* from a decision of the Mayor and Council of Elsmere denying his application to subdivide a single lot into two. He currently owns the lot and there is a home located on it. The zoning governing that lot permits two residences and DiFrancesco's application complied in all regards with applicable zoning requirements.

By a vote of seven to zero, DiFrancesco's application was denied, with five council members stating their opposition was his proposal did not preserve the general welfare of the residents of Elsmere. The Mayor and one other council person used that reason and stated they supported the Town's Planning Commission's direction in disapproving the application.

The Town of Elsmere has some discretion in reviewing minor subdivision plans. But that discretion is not unfettered. The Town's decision here was contrary to law and, in these circumstances, arbitrary and capricious. The writ is **GRANTED**.

Factual Background

DiFrancesco owns a 16,800 square foot lot at 407 Junction Street in Elsmere. The property's size and zone permit two residences. At the moment, there is only one residence on the property. DiFrancesco proposed to subdivide the larger parcel into two parts. It is a minor subdivision.

His proposal was to have the current residence be on a lot size of about 6,000 square feet. The remaining lot of about 10,800 square feet, would have another single

family home on it. Access to Junction Street to and from that lot would be by a driveway through the smaller parcel. Not only is DiFrancesco's lot zoned to allow two single family homes, the proposal he made complied with all other zoning requirements, such as set backs, side yards, etc.

DiFrancesco's application for minor subdivision went first to the Elsmere Planning Commission. It recommended to City Council that the application be denied. Its reasons were that it did not fit with character of the area, or fit within the neighborhood. It also said DiFrancesco's proposal did not fit within Master Plan.

Council conducted a hearing on this application as required by the Town's ordinances. Several neighbors spoke personally or through others.¹ Di Francesco's

¹ Several portions that testimony include Kathy Luck reading from a neighbor's letter: We have been impacted by Mr. DiFrancesco's plans in the past. He petitioned the neighborhood several years ago to obtain a variance for his quote "garage" unquote. He misrepresented himself to everyone he spoke to in regard to the size and dimensions of the building. We were told it would be a two story, two car garage. We all watched as it continued to get larger and larger, turning into an enormous building it is today. He has also in the past set upon a harrasive campaign with several of our neighbors which created bad feelings for him from all of us in our area.

One other issue with him has been the purchasing and leaving of empty houses in homeowner-based family-oriented neighborhoods. He at one point was trying to buy property and more houses in our neighborhood leaving us to wonder what his agenda was.

All us as neighbors have gotten together because we feel that Mr. DiFrancesco feels he has the right to do whatever he wishes whenever and why ever he wants to, irregardless of how it impacts the lives and properties of those around him. He has taken advantage in the past and has shown his scornful and hateful behavior to people because he did not get his way, taking something they possess. We feel as a group that he does not have the right to have an exception to the town plan simply because he wants it. Who among us would be given that right?

* * * * *

Rocky Ferrante speaking: I'm Rocky Ferrante. I live at 410 Junction Street. I'm here
(continued...)

proposal before Council, as noted, was for a use permitted in the zoning covering his property and met all other zoning requirements. In a unanimous vote, Council, including the Mayor, denied his minor subdivision application.

Five council persons voted to reject the application because it “does not protect and preserve the general welfare of the residents in the Town of Elsmere.”² A sixth council person stated that same reason and added that he took into account the direction of the Planning Commission. Finally, Mayor Herold voted to reject the application for all these reasons.

DiFrancesco has filed a writ of certiorari from this decision.

Applicable Standards

There is no statutory or other right to appeal the Town’s decision. Review is by writ of *certiorari*; and is a more limited basis of review than an appeal would be. *Certiorari* is on the record and this Court does not weigh the evidence or review the

¹(...continued)

representing my father, too, who lives at 405 Junction Street and I just - - I don’t see where this house is going, you know, building a house behind a house like that. My dad bought that house because it backs up against woods and he likes the privacy in his back yard. Now if you put a house behind that house it’s going to take his privacy away. You know, Junction Street is a dead end street. It’s a private street. I don’t see why you need to put more house where it should. He has a big lot behind his house that faces on Junction Street, if you want to build a home there, that’s fine, but not behind another house.

All of us neighbors here are all here together tonight and we’re just here because we’re against it. So that’s all I have to say. Thank you for your time. Hearing transcript, May 11, 2006, pp. 22-24. A significant portion of the delay in bringing this matter to submission in this Court was awaiting the Town to supply the appropriate record.

² Hearing transcript p. 53.

Council's findings (in this case Council includes the Mayor).³ This Court will, on *certiorari*, consider only (1) Council's jurisdiction; (2) the regularity of the proceedings before Council; and (3) any errors of law.

Discussion

In this case, Town Council was acting within its jurisdiction to hear an application for a minor subdivision. Under the Town's ordinances only it, not the Planning Commission or any other body make that decision. There is, therefore, no issue of lack of jurisdiction. The record supplied to the Court also manifests no irregularity in the proceedings.

The only and remaining issue, therefore, is whether Council's rejection demonstrates an error of law. Such an error can be that Council's decision was arbitrary and capricious.⁴

Council's authority to act in this area starts with an enabling statute:

§ 301. Grant of Power

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.⁵

³ *Reese v. Bd. of Bldg. Appeals of City of Newark*, 746 A.2d 271, 274 (Del. 2000).

⁴ *Wildel Realty, Inc. v. New Castle County*, 282 A.2d 612, 614 (Del. 1971).

⁵ 22 *Del. C.* § 301.

From that enabling legislation the Town of Elsmere has enacted ordinances relating to subdivision:

§ 196-2. **Authority.** [Amended 5-30-1996 by Ord. No. 326]

By authority of the Home Rule Charter of the Town of Elsmere, the Council of the Town of Elsmere, Delaware, hereafter referred to as “the Council,” adopts the following regulations governing the subdivision of land within the corporate limits of Elsmere, Delaware, and hereby **exercises its authority to review, approve and disapprove plans for the subdivision of land** within the corporate limits of Elsmere, Delaware. By the authority of the Town of Elsmere Ordinance No. 99, the Planning Commission shall exercise its authority to review plans for the subdivision of land and **make recommendations** for approval or disapproval. The Town of Elsmere shall be exempted from these regulations.

* * * * *

[A]ssure adequate sites suitable for residential, industrial and commercial development within the town. Such development should be coordinated with existing streets and structures to ensure that adequate open space and efficient traffic flow are maintained. These subdivision regulations are designed to protect and preserve the health, safety and general welfare of all Elsmere residents.⁶

Council when sitting as the arbiter of a minor subdivision application sits in a ministerial not a legislative capacity.⁷ This Court does not look behind the record to examine or determine Council’s motives.⁸

The hearing before Council revealed concerns, through questions to DiFrancesco’s attorney, about traffic, “densification” and other matters. But these concerns have to be

⁶ Town Codes §§ 196-2 and 196-3 (emphasis added).

⁷ *Concord Towers, Inc. v. McIntosh Inn of Wilmington*, 1997 WL 525860 (Del. Ch. 1997),
* 7.

⁸ *Krahmer v. McClafferty*, 288 A.2d 678, 681 (Del. Super. 1972).

put in the context of a property already zoned to allow two houses and the addition of but one house.

This Court cogently stated on an earlier occasion why Council's decision in this case is contrary to law:

The Planning Commission takes the position that it can consider this evidence in the context of the language dealing with the overall intent of the Dover zoning ordinance to provide for the orderly and desirable development of land as well as the language at Article 10 § 2.2 of the site plan ordinance where the Commission is told to consider "the public health, safety and welfare, the comfort and convenience of the public in general and the residents of the immediate neighborhood in particular" when acting upon site plans. It then says that the Planning Commission can completely reject a site plan and on appeal, its decision can only be reversed if it is found to have been arbitrary and capricious. In other words, the Planning Commission contends that it has the power to completely reject a site plan for a project that complies with the zoning ordinance if it is fairly debatable that the project would adversely impact the public health, safety, welfare, comfort and convenience of the neighborhood.

The Planning Commission may not reject a site plan for a permitted use on the grounds that the project will adversely effect the general neighborhood. When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in the ordinances and subject to reasonable conditions with the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances.⁹

⁹ *East Lake Partners v. City of Dover Planning Com'n*, 655 A.2d 821, 825 (Del. Super. 1994).

This Court re-confirmed the limits placed on municipalities when dealing with a use permitted in given zone. The City of Newark sought to place a restriction on alcohol consumption in an apartment building project where it was to be built on property zoned to allow apartments. All aspects of the project met Newark ordinances. The proposed limitation exceeded the town's authority.¹⁰

Elsmere cites *Handloff v. City of Newark*,¹¹ as authority for its right to reject DiFrancesco's minor subdivision application. *Handloff* is factually inapposite. In order to construct the apartment building at issue in that case, the property owner had to obtain a variance for parking as the parking available was inadequate to meet Newark's regulations governing the ratio of spaces needed for the number of apartment units. In short, unlike this case, and the two cited above, the proposal did not meet all requirements for the property. This fact left Newark with more discretion.

The ability to have ordinances regulating land use for purposes of general welfare has long been established. That is the policy behind allowing municipalities to enact land use ordinances. But that policy has limits. To allow it to be used twice to give a governmental entity unbridled discretion to reject a minor subdivision application that is otherwise a ministerial process and where all applicable land use regulations are complied

¹⁰ *Delta Eta Corp. v. City Council of City of Newark*, 2005 WL 1654581 (Del. Super.), at *3.

¹¹ 2006 WL 1601098 (Del. Super.).

with, is arbitrary. Elsmere's discretion is not without limits.¹² If the Council wanted to impose certain reasonable conditions, such as a planting a screen, it would have been acting within its limited discretion. But to say the general welfare is affected, "densification" and traffic, by one house is arbitrary when all necessary requirements are otherwise met and satisfied. DiFrancesco had certain expectations in owning a property zoned to allow two single family residences and under the circumstances here that expectation cannot be unreasonably frustrated, as it was.

If Council wanted to make the Master Plan a zoning reality, then it should rezone those areas that do not comport with that plan (a course of action with other consequences). It cannot use the subdivision process as it did here as a back door rezoning.

Conclusion

For the reasons stated herein, this petition for writ of certiorari of John Defrancesco is **GRANTED**. The matter is remanded to the Council of the Town of Elsmere for action consistent with this opinion.

IT IS SO ORDERED.

J.

¹² *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241 (Del. Super. 1976); *aff'd* 379 A.2d 1118 (Del. Super. 1976).